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NO. 84-826

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections,

Petitioner,

vs.

OSCAR BROWN BOYKINS, JR.,

Respondent.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE ELEVENTH CIRCUIT IGNORED THIS COURT'S HOLDING IN ENGLE V. ISAAC, 456 U.S. 107 (1982), WHEN IT REVERSED A DISTRICT COURT WHICH HAD DENIED A PETITION FOR WRIT OF HABEAS CORPUS, AND CONSIDERED ON THE MERITS, WITHOUT EITHER A SHOWING OR FINDING OF CAUSE AND PREJUDICE, AN ISSUE OF STATE EVIDENTIARY LAW OVER WHICH THE FEDERAL COURTS HAD NO SUPERVISORY AUTHORITY AND WHICH IN THE STATE COURTS HAD NOT BEEN RAISED IN TERMS OF FEDERAL EVIDENTIARY LAW ON DIRECT APPEAL AND HAD NOT BEEN RAISED AT ALL ON COLLATERAL ATTACK?

II.

WHETHER THE COURT OF APPEALS IGNORED THIS COURT'S OPINION IN WAINWRIGHT V. GOODE, ___ U.S. ___, 78 L.Ed.2d 187

(1983), and LISENBA V. CALIFORNIA, 314 U.S. 219 (1941), WHEN IT REVIEWED, UNDER THE GUISE OF DUE PROCESS AND A DENIAL OF FUNDAMENTAL FAIRNESS, A QUESTION OF STATE EVIDENTIARY LAW WHICH HAD NOT BEEN RAISED IN THE STATE COURTS IN TERMS OF FEDERAL CONSTITUTIONAL LAW AND WHICH HAD BEEN REJECTED AS A MATTER OF STATE LAW BY A STATE APPELLATE COURT?

III.

WHETHER 28 U.S.C. §2254(d) PERMITS A FEDERAL COURT TO CONTRAVENE STATE LAW THAT EXPERT PSYCHIATRIC TESTIMONY, WHICH DOES NOT GO TO WHETHER THE DEFENDANT WAS SANE AT THE TIME OF THE CRIME, IS IRRELEVANT AND THUS INADMISSIBLE IN A CASE INVOLVING A STATE LAW DEFENSE OF INSANITY, IN LIGHT OF THE COURT'S OPINION IN FISHER V. UNITED

STATES, 328 U.S. 463 (1946), WHICH HELD THAT THE CONSTITUTION DID NOT REQUIRE THE DISTRICT OF COLUMBIA TO MAKE SUCH TESTIMONY RELEVANT TO AN INSANITY DEFENSE?

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REASONS WHY THE WRIT SHOULD BE GRANTED

The State of Florida submits that the Court should not be misled by Respondent's attempt to confuse the Court into concluding that the issues presented by the Petitioner are not properly before the Court or are not

worthy of the Court's consideration.

First, the Court should not be misled by Respondent's attempt to convince the Court that the federal constitutional issue concerning Dr. Rodriquez's testimony was properly presented to the state courts in terms of federal constitutional law because federal constitutional principles were discussed in a different argument in Respondent's direct appeal brief in the state court. See Response at page 2. Similarly, Respondent has emphasized that Florida's brief on direct appeal in Florida did not argue procedural default. See Response at page 2. However, the issue is not whether the State of Florida argued procedural default on direct appeal, but rather, the issue is

whether Respondent presented his Dr. Rodriquez claim in terms of federal constitutional law in his direct appeal.

Contrary to Respondent's contentions, the State of Florida has never acknowledged that the "subject matter" of the Rodriquez claim was raised on direct appeal. See Response at 4. Instead, the State's argument in the Eleventh Circuit was that the Rodriquez claim had never been presented to the state courts in terms of federal constitutional law as opposed to state evidentiary law. Concerning Respondent's attempts to convince the Court that the State of Florida has argued exhaustion, Petitioner asserts that exhaustion has never been urged for the simple reason that the State is relying upon the procedural default

doctrine of Engle v. Isaac, 456 U.S. 107 (1982). The only reason that Anderson v. Harless, 459 U.S. 4 (1982), was cited was because that case discusses what constitutes sufficient presentation of a federal constitutional claim to the state courts in terms of federal constitutional law in order that the issue may be raised on federal habeas corpus. This Court made it clear in Engle v. Isaac, supra, at 456 U.S. 126, n. 28 that "the problem of waiver is separate from the question of whether a state prisoner has exhausted state remedies." To the extent that the Eleventh Circuit stated in Respondent's case, see Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984), that the State had argued lack of exhaustion,

the Eleventh Circuit was in error.

Respondent's argument on pp. 5-7 of his Response demonstrate that Respondent still does not understand that the State has never argued exhaustion but instead has at all times relied upon procedural default. Furthermore, Respondent's contention that the State of Florida is guilty of "sandbagging" is incomprehensible in light of the fact that this Court has repeatedly recognized that a Respondent may defend the judgment below on any ground which the law and record will permit, provided the asserted ground would not expand the relief which has been granted. See, e.g., Smith v. Phillips, 455 U.S. 209, 215, n. 6 (1982). Thus, assuming only for the sake of

argument that the State of Florida did not raise procedural default until briefs were filed in the Eleventh Circuit, the claim could still be raised under this Court's existing law. However Florida reiterates that its position in the pre-evidentiary hearing stipulation was that all claims except alleged ineffective assistance of counsel were not cognizable on federal habeas corpus because of unexcused procedural defaults. See Petition at A-42.

Finally, Respondent's contention that this Court's opinion in Fisher v. United States, 328 U.S. 463 (1946), has no applicability to this case is untenable. No matter how Respondent has characterized what occurred in this

case, the fact remains that the Eleventh Circuit has held that a state must make relevant to a state law defense of insanity a history of past mental problems. Of course, Fisher held to the contrary.

CONCLUSION

The State of Florida respectfully urges that the Court not be misled by Respondent's attempt to convince the Court that procedural default was never argued in the federal district court. However, in the event that the Court is inclined not to grant certiorari on that issue, the State of Florida respectfully requests the Court to grant certiorari to review the Eleventh Circuit's opinion which is in conflict with Fisher v. United States, supra.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 copies of the foregoing have been furnished to Howard W. Skinner, Assistant Federal Public Defender, Post Office Box 4998, Jacksonville, Florida, 32201, on this _____ day of January, 1985. All parties required to be served have been served.

LAWRENCE A. KADEN
Assistant Attorney General

COUNSEL FOR PETITIONER